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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 United States of America,  
9 Respondent,  
10 vs.  
11 Santos Alberto Garcia-Gonzalez,  
12 Defendant/Movant.  
13

No. CV 15-554-TUC-CKJ  
CR 09-073-TUC-CKJ

**ORDER**

14 Pending before the Court is the Motion Under 28 USCS § 2255 or in the  
15 Alternative 28 USCS § 2241 (CV 15-554, Doc. 1; CR 09-073, Doc. 41) filed by Movant  
16 Santos Alberto Garcia-Gonzalez (“Garcia-Gonzalez”). A response (CV 15-554, Doc. 6)  
17 has been filed.

18  
19 *I. Procedural Background*

20 On January 21, 2009, Garcia-Gonzalez was indicted on one count of Re-Entry  
21 After Deportation (CR 09-073, Doc. 6). On February 18, 2009, Garcia-Gonzalez pleaded  
22 guilty to the Indictment pursuant to a plea agreement (CR 09-073, Docs. 13 and 15).

23 On May 5, 2009, Senior District Court Judge Frank R. Zapata sentenced Garcia-  
24 Gonzalez. District Judge Zapata adopted the advisory United States Sentence Guidelines  
25 (“USSG”) as to the illegal re-entry matter in CR 09-073, finding they were appropriate  
26 based on the information contained in the pre-sentence report (“PSR”) and the lack of  
27 objection by either counsel. During the sentencing proceeding, counsel and the Court  
28 discussed the prior convictions of Garcia-Gonzalez. Garcia-Gonzalez had received an

1 18 month sentence for driving a vehicle with 307 pounds of marijuana and a 21 month  
2 sentence for Possession with Intent to Distribute Less than 50 Kilograms of Marijuana  
3 (i.e., a “backpacker” case). Garcia-Gonzalez was sentenced to a term of forty-six (46)  
4 months in the custody of the Bureau of Prisons to be followed by a thirty-six (36) month  
5 term of supervised release. District Judge Zapata also sentenced Garcia-Gonzalez at that  
6 time for a supervised release violation in CR 06-2172-TUC-FRZ-JR.

7 On May 22, 2003, a Petition to Revoke Supervised Release (CR 09-073, Doc. 22)  
8 was filed. The matter was reassigned to this Court. Additionally, a new case was  
9 initiated against Garcia-Gonzalez to further address the conduct alleged in the Petition  
10 to Revoke Supervised Release. *See* CR 13-928-TUC-CKJ-JR.

11 On June 25, 2013, Garcia-Gonzalez admitted the allegations contained in the  
12 Petition to Revoke Supervised Release pursuant to an agreement with the government  
13 (CR 09-073, Docs. 28 and 30). On that same date, Garcia-Gonzalez pleaded guilty to Re-  
14 Entry After Deportation pursuant to a plea agreement in the companion case (CR 13-928,  
15 Docs. 15 and 16). On September 3, 2013, Visiting District Court Judge Algenon L.  
16 Marbley sentenced Garcia-Gonzalez to a term of twelve (12) months in the custody of the  
17 Bureau of Prisons, with the sentence to run consecutive to the sentence in CR 13-928-  
18 TUC-CKJ-JR. In the companion case, Judge Marbley sentenced Garcia-Gonzalez to a  
19 term of fifty-seven (57) months in the custody of the Bureau of Prisons, to be followed  
20 by a thirty-six (36) month term of supervised release.

21 On January 30, 2015, Garcia-Gonzalez filed a Motion Under 18 U.S.C. §  
22 3582(c)(2) in both this case and the companion case (CR 09-073, Doc. 38; CR 13-928,  
23 Doc. 24)). This Court denied the motions on March 26, 2015.

24 On November 30, 2015, Garcia-Gonzalez filed a Motion Under 28 USCS §2255  
25 or in the Alternative 28 USCS § 2241 (CV 15-554, Doc. 1; CR 09-073, Doc. 41). The  
26 government filed a response on April 14, 2016 (CV 15-554, Doc. 6).

1 II. *Legality of 46 Month Term of Imprisonment*

2 Garcia-Gonzalez argues his forty-six (46) month term of imprisonment is  
3 unconstitutional pursuant to the “residual clause” of the Armed Career Criminal Act  
4 (“ACCA”). The government asserts, however, Garcia-Gonzalez was not sentenced  
5 pursuant to the Act; specifically, his sentence was not enhanced pursuant to the “residual  
6 clause” of the Act.

7 The Supreme Court held in *Johnson v. United States*, 576 U.S. \_\_\_, 135 S.Ct. 2551  
8 (2016), that increasing a defendant’s sentence under the “residual clause” of the ACCA  
9 denies due process of law because the residual clause in the statutory definition of  
10 “violent felony” is unconstitutionally vague. 135 S.Ct. at 2557. In *Welch v. United*  
11 *States*, — U.S. —, 136 S.Ct. 1257 (2016), the Supreme Court held that its decision in  
12 *Johnson* regarding the vagueness of the residual clause in § 924(e)(2)(B)(ii) announced  
13 a substantive rule that applies retroactively on collateral review.

14 Another district court stated:

15 The difficulty is that *Johnson* has no bearing on Defendant's case. *Johnson* struck  
16 down the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) defining a “violent  
17 felony” for the purpose of the increased sentence authorized by 18 U.S.C. §  
18 924(e)(1). The residual clause allowed for an enhanced sentence for a prior  
conviction that “otherwise involves conduct that presents a serious potential risk  
of physical injury to another.” *Id.* § 924(e)(2)(B)(ii). There are counterparts to the  
residual clause in the sentencing guidelines and in some federal statutes.<sup>2</sup>

19 <sup>2</sup> Based on *Johnson*, the Third Circuit recently held that the residual clause  
20 at U.S.S.G. § 4B1.1.(a)(2) was unconstitutionally vague. *United States v.*  
*Calabretta*, — F.3d —, 2016 WL 3997215, at \*4 (3d Cir. 2016).

21 However, review of Defendant's case reveals that no such residual clause played  
22 any role in Defendant's conviction and sentence. Defendant was convicted of a  
23 drug-trafficking offense, and his sentence was imposed based on two prior felony  
24 drug offenses.

25 *United States v. Reaves*, No. 1:CR-07-104-03, 2016 WL 4479296, at \*2 (M.D. Pa. Aug.  
26 25, 2016); *see also In re Baptiste*, 828 F.3d 1337, 1341 (11th Cir. 2016);  
27 *Nevarez-Sanchez v. United States*, No. 15CR0191, 2016 WL 5464548, at \*2 (S.D. Cal.  
28 Sept. 28, 2016).

The Court has reviewed the record in this case, including the transcripts of the

change of plea (CR 09-073, Doc. 44) and sentencing (CR 09-073, Doc. 45) and the pre-sentence report. Like the defendant in *Reaves*, a residual clause did not play any role in Garcia-Gonzalez's conviction and sentence. Rather, the prior felony conviction that enhanced his sentence was a felony drug-trafficking offense, which was a specifically enumerated basis for enhancement under the applicable guideline at that time. *See* U.S.S.G. §2L1.2(b)(1)(A)(I). "Because [Garcia-Gonzalez] was not sentenced under the ACCA or a like-worded provision of the USSG, and because the provision of the USSG under which he was sentenced – § 2L1.2 – is not vague or otherwise unconstitutional, the Court finds the motion fails on the merits." *Nevarez-Sanchez v. United States*, No. 15CR0191, 2016 WL 5464548, at \*3 (S.D. Cal. Sept. 28, 2016).

### III. *Certificate of Appealability* ("COA")

Rule 11(a), Rules Governing Section 2255 Proceedings, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here, the Motion is brought pursuant to 28 U.S.C. § 2255. This Court must determine, therefore, if a COA shall issue.

The standard for issuing a COA is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid

1 claim of the denial of a constitutional right and that jurists of reason would find it  
2 debatable whether the district court was correct in its procedural ruling.” *Id.* In the  
3 certificate, the Court must indicate which specific issues satisfy the showing. *See* 28  
4 U.S.C. § 2253(c)(3).

5 The Court finds that jurists of reason would not find it debatable whether the  
6 Motion stated a valid claim of the denial of a constitutional right and the Court finds that  
7 jurists of reason would not find it debatable whether the district court was correct in its  
8 procedural rulings. A COA shall not issue.

9 Any further request for a COA must be addressed to the Court of Appeals. *See*  
10 Fed. R.App. P. 22(b); Ninth Circuit R. 22-1.

11  
12 Accordingly, IT IS ORDERED:

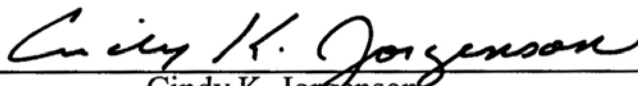
13 1. The Motion Under 28 USCS § 2255 or in the Alternative 28 USCS § 2241 (CV  
14 15-554, Doc. 1; CR 09-073, Doc. 41) is DENIED.

15 2. Cause No. CV 15-554 is DISMISSED.

16 3. The Clerk of the Court shall enter judgment and shall then close its file in  
17 Cause No. CV 15-554.

18 4. A Certificate of Appealability shall not issue in this case.

19 DATED this 4th day of January, 2017.

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21   
22 Cindy K. Jorgenson  
23 United States District Judge  
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